Ky. Op. Atty. Gen. 08-ORD-147, 2008 WL 3092428 (Ky.A.G.)

Office of the Attorney General
Commonwealth of Kentucky

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July 25, 2008

In re: Darcy Stewart/Western Pulaski County Water District

***Summary:*** In failing to issue a written response within three business days of receipt, citing the statutory exception(s) being relied upon and briefly explaining how the exception(s) apply on the facts presented, the District violated the mandatory terms of KRS 61.880(1). Because requester apparently resides and/or has his "principal place of business" in the same county where the records are located, KRS 61.872(3)(b) authorizes the agency to require inspection prior to providing copies. Insofar as the requester did not "precisely describe" the records being sought, nor can the records consequently be properly characterized as "readily available," the requester would not otherwise be entitled to receive copies by mail under this provision. However, the description provided "was adequate enough for a reasonable person to ascertain the nature and scope" of the request and nothing more is required in light of *Commonwealth v. Chestnut*, Ky., 250 S.W.3d 655, 661 (2008); KRS 61.872(2) does not contain "any sort of particularity requirement."

***Open Records Decision***

At issue in this appeal is whether the Western Pulaski County Water District violated the Kentucky Open Records Act in partially denying the requests submitted by Darcy Stewart on behalf of Crawford & Crawford & Stewart Engineers, Inc. for ten categories of records. Because Mr. Stewart apparently resides and/or has his "principal place of business" in the county where the records are located, KRS 61.872(3)(b) authorizes the agency to require inspection prior to providing copies. Insofar as Mr. Stewart did not "precisely describe" the records being sought, nor can the records consequently be properly characterized as "readily available," the District would not otherwise be obligated to provide him with copies by mail under this provision.

By letter dated April 30, 2008, but sent to Records Custodian Don Calder on May 1, 2008, and delivered via certified mail on May 2, 2008, Mr. Stewart advised that records described on the attached form were being requested for "personal, not-for-profit use." In addition, Mr. Stewart asked the District to "notify this office of volume, copying costs, etc. prior to delivery[,]" noting that the "cost, per the statute, of copying only will be paid by this office and is expected to be no more than 10 cents ($0.10) per page per other Kentucky agencies' Open Records Request forms." According to Mr. Stewart, "$20.00 is a reasonable upper limit to such costs, which should be much lower"; thus, he also requested to be notified if there was "an unusual volume in any category." More specifically, Mr. Stewart requested copies of the following documents:

1. All ARC Grant application and grant agreement documents, for ARC grants from 1997 through today, including all grant payments awarded but not allocated and disbursed. In particular, all documents are requested for a $300,000 grant awarded on or about 1999 or 2000 by letter to WPCWD but which was not disbursed to WPCWD and which should include any communications concerning those funds and how funds were [reallocated] and transferred to another party.

***2** 2. All engineering agreements with any party from 2000 through today, including budget, scope, name or description, estimates of cost, engineering fee schedule, effective dates, source of funds, and records of all payments made by date, project, funding source, etc. Payment records should include copies of the actual checks.

3. All current KIA and Lake Cumberland Area Development District office "Project Profiles."

4. All grant and loan applications and all awarded grants and loans by project, date, funding agency, etc. The grant and loan documents required include budgets, payments, letters of condition, but not detailed supporting documents as required for final award. Funding agencies include but are not limited to: KY Transportation Cabinet, KY Infrastructure Authority (KIA), ARC, Tobacco Development Fund, Rural Development, Community Development Block Grant, etc. Include all records of receipts, disbursements, payments to contractors, payments to engineers, etc. by date, by project, by funding agency, etc.

5. All Transportation Cabinet communications concerning Quest Engineers and/or with Quest Engineers.

6. All communications with Neal Shoemaker.

7. All communications with Alan Edwards.

8. All communications with the Highway District 8 office.

9. All developer addition agreements from 2000 through today. Developer addition documents include budgets, payments to the contractor, receipts from the developer, payments to the engineer, etc. by date, project, developer, etc. Developer agreements include but are not limited to: Wolf Creek.

10. All WPCWD Board meeting minutes from January 2003 through today.

Having received no response to his request, Mr. Stewart submitted a nearly identical written request by letter with attached form dated May 8, 2008, advising it was "the second request because the first, certified letter mailed on May 1, 2008, has not been accepted as of this date." Noting that a check for $20.00 "was included with the first request[,]" Mr. Stewart again requested that Mr. Calder "notify this office of the approximate cost prior to filling this order and bill for the amount when approved." By letter dated June 13, 2008, Mr. Stewart initiated this appeal challenging the District's failure to respond upon receipt of both requests, noting that his first request was sent on May 1, 2008, "by certified, return-receipt mail and the second mailing was on May 8, 2008, by regular mail with a certificate of mailing. The first letter was tracked by the U.S. Postal Service as delivered on 5/2/08 and signed as received by a WPCWD employee, Glinda Mathis." According to Mr. Stewart, his firm's check "has never cleared the bank and was never returned." Copies of his requests and the "certificates for each are enclosed including the USPS delivery record." In conclusion, Mr. Stewart advises that his firm has filed a complaint against the District in Pulaski County Circuit Court alleging "failure to pay amounts owed on seven (7) large projects and other small jobs."

***3** Upon receiving notification of Mr. Stewart's appeal from this office, Carrie Dixon Wiese, in her capacity as counsel for the WPCWD Board, responded on behalf of the District. Acknowledging that the District "did not respond, by compliance *or* denial," to Mr. Stewart's initial request within three business days, Ms. Wiese nevertheless contends that because his next letter "was an exact copy of the first letter and was not a complaint" that his request was denied, receipt of the second letter "constitutes the actual date that Mr. Stewart's request was made to the District." Although Mr. Stewart "at no time contacted the District with a complaint that his request

had been denied or that no response had been made[,]" the District "will concede that a response is warranted and required by law within 3 days of receipt." Attached to Ms. Wiese's response is a copy of "a written response from the District [specifically, Chairman Calder] concerning Mr. Stewart's requests sent to Mr. Stewart on or about June 30, 2008."

In Ms. Wiese's view, this appeal "may be premature due to the fact that the [District] did not *refuse* to provide a response to Mr. Stewart," nor did the District send Mr. Stewart "a *denial* of his request, one of which is required under KRS 61.[880] and 40 KAR 1:030 [Section 1] in order for a person to appeal under the Open Records Act. Although the District "clearly failed to respond within the time limits," it "did not refuse to respond [altogether]. Nor did the District issue any denials to Mr. Stewart." Ms. Wiese confirms that "the District and Mr. Stewart are involved in a very complicated civil suit which has now entered into the Discovery Process[,]" correctly observing that a pending suit does not give the District "the right to deny or refuse" his requests. Although the District's desire to consult with the outside counsel representing it in the civil suit before responding to Mr. Stewart's request does not excuse the "tardiness or failure to respond, it is at least an explanation." Citing 40 KAR 1:030, Section 6 Ms. Wiese correctly asserts that any issues related to documents released to Mr. Stewart after his appeal was filed are now moot; however, Ms. Wiese then seems to suggest a new appeal or special request from Mr. Stewart is required for this office to proceed in reviewing the agency's response as to categories of records which are still in dispute. [FN1] Because the written record is now complete, this office must issue a written decision addressing the merits of this appeal in accordance with KRS 61.880(2)(a). [FN2]

In the "District's official response," Chairman Calder advised Mr. Stewart to "Please see documents attached hereto" in responding to Items 1, 3, and 10, presumably meaning that he provided with copies of any existing records in the District's possession which are responsive. [FN3] With regard to Item 2, Mr. Calder characterized Mr. Stewart's request as "overbroad and overburdensome [sic]." Citing KRS 61.872(2), Mr. Calder asked Mr. Stewart to "submit a more specific request as to which engineering agreements you are referring [to] and/or which types of engineering agreements you wish to inspect so that we may respond appropriately." In addressing Item 4, Mr. Calder also indicated that Mr. Stewart's request was "overbroad and overburdensome. Therefore, grants/loans documents [sic] for the last 3 years have been provided to you. If you wish to inspect additional items, please give us a time frame so that we may respond appropriately." [FN4] As to Items 5-9, Mr. Calder denied Mr. Stewart's request on the same basis, requesting "a more specific request as to subject matter and a time frame so that we may respond." Based upon the following, this office finds the District's response procedurally deficient; however, the agency is entitled to require inspection prior to providing copies under KRS 61.872(3)(b).

***4** As a public agency, the District is obligated to comply with procedural and substantive provisions of the Open Records Act regardless of the requester's identity or purpose in requesting access generally speaking. More specifically, KRS 61.880(1) contains the procedural guidelines which a public agency must comply with in responding to requests. In relevant part, KRS 61.880(1) provides:

> Each public agency, upon any request for records made under KRS 61.870 to 61.884, shall determine within three (3) days, excepting Saturdays, Sundays, and legal holidays, after the receipt of any such request whether to comply with the request and shall notify in writing the person making the request, within the three (3) day period of its decision. An agency response denying, in whole or in part, inspection of any record shall include a statement of the specific exception authorizing the withholding of the record and a brief explanation of how the exception applies to the record withheld.

(Emphasis added). In construing the mandatory language of this provision, the Kentucky Court of Appeals observed that "[t]he language of [KRS 61.880(1)] directing agency action is exact. It requires the custodian of re-

cords to provide *detailed and particular information* in response to a request for documents…. [A] limited and perfunctory response [does not] even remotely comply with the requirements of the Act-much less amount [ ] to substantial compliance." *Edmondson v. Alig*, Ky. App., 926 S.W.2d 856, 858 (1996); 04-ORD-208.

By its express terms, KRS 61.880(1) requires public agencies to issue a written and reasonably specific response within three business days of receiving a request. In general, public agencies cannot postpone this deadline. 04-ORD-144, p. 6. "The value of information is partly a function of time." *Fiduccia v. U.S. Department of Justice*, 185 F.3d, 1035, 1041 (9th Cir. 1999). As frequently noted by the Attorney General, this is a "fundamental premise of the Open Records Act, underscored by the three day agency response time codified at KRS 61.880(1)." 01-ORD-140, p. 3. In this case, the District did not issue a written response of any kind, let alone specifying the reason for denying or postponing access until Mr. Stewart filed this appeal over a month later; agency inaction is not permissible. [FN5]

Although the burden on the agency to respond within three working days "is, not infrequently, an onerous one," [FN6] the only exception to this general rule, which does not apply here, is codified at KRS 61.872(5), which authorizes postponement of access only under the following conditions:

> If the public record *is in active use, in storage or not otherwise available*, the official custodian shall immediately notify the applicant and shall designate a place, time, and date for inspection of the public records, not to exceed three (3) days from receipt of the application, *unless a detailed explanation of the cause is given for further delay and the place, time, and earliest date on which the public record will be available for inspection*.

***5** (Emphasis added.) If any of those conditions exist, a public agency must "*immediately* so notify" the requester, *and* designate a place, time, and date for inspection "not to exceed" three days from receipt of the request, "unless a *detailed explanation* of the cause is given for further delay and the place, time and earliest date on which the public record will be available for inspection." KRS 61.872(5) (emphasis added); 06-ORD-254; 02-ORD-165.

In sum, the District initially failed to issue a written response; its belated response lacks the specificity envisioned by KRS 61.880(1) insofar as the District neglected to cite any exception or briefly explain how the exception upon which it was presumably relying at least partially, KRS 61.872(6), applies. Bearing in mind that public agencies have the burden of proof under KRS 61.880(2)(c), and that KRS 61.880(1) "requires the custodian of records to provide detailed and particular information in response to a request for documents," this office must conclude that the District's response was procedurally deficient. *Edmondson v. Alig*, *supra*, at 858; 97-ORD-170. To avoid future violations, the District should be guided by the longstanding principle that the procedural requirements of the Open Records Act "are not mere formalities, but are an essential part of the prompt and orderly processing of an open records request." 93-ORD-125, p. 5.

In responding to Mr. Stewart's "overbroad and overburdensome" request for *copies* of records, Chairman Calder asks him to clarify the subject matter and specify a time frame, citing KRS 61.872(2) as to Item 2. KRS 61.872 governs access to public records. More specifically, KRS 61.872(3) provides:

A person may inspect the public records:

> (a) During the regular office hours of the public agency; or
>
> (b) By receiving copies of the public records from the public agency through the mail. The public agency shall mail copies of the public records *to a person whose residence or principal place of business is outside the county in which the public records are located* after he *precisely describes* the public records which are

> *readily available* within the public agency. If the person requesting the public records requests that copies of the records be mailed, the official custodian shall mail the copies upon receipt of all fees and the cost of mailing. (Emphasis added.)

As the Attorney General has often recognized, the Open Records Act contemplates access to records "by one of two means: On-site inspection during the regular office hours of the agency, in suitable facilities provided by the agency, or receipt of the records from the agency through the mail." 03-ORD-067, p. 4. Thus, a requester who both lives and works in the same county where the public records are located may be required to inspect the records prior to receiving copies. Id. On the other hand, a "requester whose residence or principal place of business is outside the county where the public records are located may demand that the agency provide him with copies of the records, without inspecting those records, *if* he *precisely describes* the records *and* they are readily available within the agency. See, e.g., 95-ORD-52, 96-ORD-186." Id., p. 5.

***6** Because Mr. Stewart's firm (or "principal place of business") is located in Burnside, Kentucky, a city within Pulaski County, and the records in question are located in Pulaski County as well, Mr. Stewart is unable to satisfy the threshold requirement of KRS 61.872(3)(b); accordingly, the District may require him to conduct on-site inspection of records which are potentially responsive prior to furnishing copies. See 08-ORD-132. In construing this provision, the Attorney General has consistently observed that KRS 61.872(3)(b) places a greater burden on requesters who wish to access public records by receipt of copies through the mail. 99-ORD-63, p. 3 (citation omitted). Whereas KRS 61.872(2) [FN7] merely requires a requester to "describ[e]" the records which he wishes to access by on-site inspection, KRS 61.872(3)(b) requires the requester to "precisely describe" the records which he wishes to access by mail. [FN8] In other words, a requester satisfies the second requirement of KRS 61.872(3)(b) if he describes in "definite, specific and unequivocal terms" the records he wishes to access by mail. Id. This Mr. Stewart has not done. However, Mr. Stewart is only required to satisfy the lesser standard of KRS 61.872(2) in order to conduct on-site inspection, which the District, as noted, is authorized to require prior to providing him with copies.

In *Commonwealth v. Chestnut*, Ky., 255 S.W.3d 655, 661 (2008), the Kentucky Supreme Court observed that in contrast to KRS 61.872(3)(b) "nothing in KRS 61.872(2) contains any sort of particularity requirement." *Id*. at 661. Declining to "add a particularity requirement where none exists," the Court held that a request is adequately specific if the description would enable "a reasonable person to ascertain the nature and scope of … the request." *Id*. Because nothing more was required, and Mr. Stewart "likely could not have done anything more because he could not reasonably be expected to request blindly, yet with particularity, documents … that he had never seen[,]" the District is required to provide him with an opportunity to conduct on-site inspection; nothing more, nothing less. See 08-ORD-132.

Assuming for the sake of argument that Mr. Stewart resided and/or worked in a different county, the District would still not be required to mail copies because the records are not "precisely described" nor can the records be properly characterized as "readily available." This final requirement "permits public agencies to avoid the duty to mail copies if the requested records are widely dispersed or otherwise difficult to access. In such instances, agencies would be forced to make extraordinary efforts to identify, locate, and retrieve the records in order to copy and mail them to the applicant." 99-ORD-63, p. 3. As the Attorney General first articulated in OAG 76-375, "[public] agencies and employees are the servants of the people …, but they are the servants of all the people and not only of persons who may make extreme and unreasonable demands on their time." Id., p. 4; 99-ORD-63. Consequently, this office has consistently held that if the records which the applicant requests to access by receipt of copies via mail "cannot be readily accessed and retrieved within the public agency, the agency cannot be compelled to deliver copies to him though he resides and works in a county other than the

county where the records are located, and he precisely describes them." Id., pp. 3-4. Under such circumstances, "the agency satisfies its obligations under the Open Records Act *by making the records available for inspection during normal office hours. "* Id. (Emphasis added.) In 97-ORD-46, and many subsequent decisions, the Attorney General nevertheless held that "it is … incumbent on the agency to indicate, in at least general terms, the difficulty in identifying, locating, and retrieving the requested records." Id., p. 5. This the District has not done. Compare 08-ORD-018.

***7** Unlike the records at issue in 04-ORD-028 (any and all "*investigatory* records relating to an *isolated* incident involving a *named* individual that occurred at a *designated* location on a *specific* date"), for example, the records to which Mr. Stewart requested access were not described with adequate specificity to enable the records custodian at the District to *conclusively* determine that *all* such records were identified, located, retrieved, and copied, the intentionally *higher* standard which a requester must satisfy in order to access records *by mail*. However, the District has not even attempted to establish the approximate number of records implicated by the request, the difficulties associated with accessing records which are potentially responsive, or the estimated manpower that would be required in making a good faith effort to make such records available for inspection. Accordingly, the District could require Mr. Stewart to conduct on-site inspection of the records prior to furnishing him with copies even if he lived/worked in a different county but could not deny the request entirely nor may the District on the facts presented. 06-ORD-155, p. 10. Where a requester does not identify the records being sought with precision, or wishes to extract information that has not already been compiled, he must be permitted to "make a fishing expedition through public records on his own time and under the restrictions and safeguards of the public agency…." OAG 76-375, p. 3. Because Mr. Stewart's request is adequately descriptive under the standard recently articulated in *Chestnut*, the District is required "to make a good faith effort to conduct a search using methods which can reasonably be expected to produce the records" he requested. 06-ORD-177, p. 6 (citations omitted). The District cannot evade this duty altogether by claiming the request was improperly framed, but must "expend reasonable efforts to identify, locate, redact, and make available for inspection all existing nonexempt records" which are responsive to Mr. Stewart's request. Id.

Nor can the District evade this duty through an unsupported claim that honoring the request would be unreasonably burdensome under KRS 61.872(6). To prevent agencies from exploiting this provision as a means of circumventing the requirements of the Open Records Act, the General Assembly has provided that a denial under KRS 61.872(6) must be sustained by clear and convincing evidence. As consistently recognized by the Attorney General, "[t]his burden is not sustained by the bare allegation that the request is unreasonably burdensome." 00-ORD-72, p. 4. See *Chestnut* at 665 (the fact complying "will consume both time and manpower is, standing alone," not clear and convincing evidence of an unreasonable burden). In accordance with 07-ORD-261 and the authorities upon which that decision is premised, this office finds that the District failed to satisfy its burden of proof relative to KRS 61.872(6); a copy of that decision is attached hereto and incorporated by reference. [FN9]

***8** A party aggrieved by this decision may appeal it by initiating action in the appropriate circuit court pursuant to KRS 61.880(5) and KRS 61.882. Pursuant to KRS 61.880(3), the Attorney General should be notified of any action in circuit court, but should not be named as a party in that action or in any subsequent proceeding.

Jack Conway
Attorney General

Michelle D. Harrison
Assistant Attorney General

[FN1]. In short, Ms. Wiese appears to somewhat misunderstand the appeal process judging by her interpretation of KRS 61.880(2)(a) and 40 KAR 1:030, Section 1, some of which is not repeated here. Insofar as Mr. Stewart provided this office with the requisite documentation, failure to respond is a legitimate basis for appeal in and of itself, and only some issues are moot, no further action is required from Mr. Stewart for this office to proceed in resolving the instant appeal.

[FN2]. By e-mail directed to Ms. Wiese on July 9, 2008, the undersigned counsel inquired whether the District had received any response to its request for "a more specific request as to subject matter and time frame." To the best of Ms. Wiese's knowledge, the District "has not heard from Mr. Stewart in regards to the response and documents/items sent to him." Insofar as Mr. Stewart has not withdrawn his appeal or contacted the undersigned, nor has the agency provided him with all of the requested copies, the Attorney General assumes the matter has not been resolved.

[FN3]. Pursuant to 40 KAR 1:030, Section 6: "If requested documents are made available to the complaining party after a complaint is made, the Attorney General shall decline to issue a decision in the matter." See 04-ORD-046. Absent evidence to the contrary, this office assumes that Mr. Stewart has received copies of any existing nonexempt records which are responsive to Items 1, 3, and 10 of his request; accordingly, this office must decline to issue a decision as to same.

[FN4]. In our view, the request for clarification regarding the time frame is entirely reasonable and is not properly characterized as a denial. Assuming that Mr. Stewart is satisfied with the documents provided, any related issues are moot; if not, Mr. Stewart should communicate as much to the District.

[FN5]. At this juncture, we remind the District that a response issued pursuant to 40 KAR 1:030, Section 2 should be viewed as an opportunity to supplement rather than supplant its denial. "The Open Records Act presumes that the agency's KRS 61.880(1) response is complete in and of itself." 02-ORD-118, p. 3.

[FN6]. 02-ORD-165, p. 3.

[FN7]. In relevant part, KRS 61.872(2) provides that "[a]ny person shall have the right to inspect public records. The official custodian may require written application, signed by the applicant and with his name printed legibly on the application, *describing the records to be inspected*." (Emphasis added.)

[FN8]. "A description is *precise* if it is "clearly stated or depicted," *Webster's II, New Riverside University Dictionary* 926 (1988); "strictly defined; accurately stated; definite," *Webster's New World Dictionary* 1120 (2d ed. 1974); and "devoid of anything vague, equivocal, or uncertain." *Webster's Third New International Dictionary* 1784 (1963)." Id.

[FN9]. Although some of the records implicated by Mr. Stewart's request may contain exempt information, the necessity of separating "confidential documents from nonconfidential documents [cannot] serve as a basis for denying a request under KRS 61.872(6)." 00-ORD-180, p. 7. To the contrary, "the presence of some exempt information in the … [records] does not relieve [the District] of its obligation to provide all nonexempt information." 97-ORD-6, p. 4. Pursuant to KRS 61.878(4): "If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."

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